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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DOE, Individually And On Behalf Of All Others  
Similarly Situated,

Plaintiff,

VS.

NETWORK SOLUTIONS, LLC  
Defendant.

) Case No. 07-5115 JSW

) PLAINTIFF'S OPPOSITION TO  
) DEFENDANT'S REQUEST FOR  
) JUDICIAL NOTICE

) JUDGE: Hon. Jeffery S. White  
) DATE: Jan. 25, 2008  
) TIME: 9:00 am  
) CTRM: 2

1 Plaintiff respectfully submits this Opposition to Defendant's Request for Judicial Notice  
2 (Dkt.# 20).

### 3 **I. INTRODUCTION**

4 Defendant requests that this Court judicially notice eighteen different documents. These  
5 documents include five versions of a service agreement, three versions of a privacy policy, a  
6 definition from the American Heritage Dictionary and nine cases from jurisdictions around the  
7 country. All of these purported facts, with the exception of the definition, are not properly  
8 noticed by this Court. Defendant's request should be denied.

### 9 **II. ARGUMENT**

10 In this instance, Defendant requests that this Court take judicial notice of five service  
11 agreements, three privacy policies, a definition of "search engine" from the American Heritage  
12 Dictionary, and nine court cases from around the nation. Plaintiff objects to this Court taking  
13 judicial notice of any of the proffered service agreements, privacy policies or court cases.

14 A judicially noticed fact must be one not subject to reasonable dispute in that it is either  
15 "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate  
16 and ready determination by resort to sources whose accuracy cannot reasonably be questioned."  
17 Fed. R. Evid. 201(b).

#### 18 **A. The Service Agreements Are Not Admissible On A Motion to Dismiss.**

19 Defendant argues that this Court may consider the service agreement, because it is  
20 alleged, relied on and quoted in the Complaint. (Mot. 8:2-8.) Defendant's premise is false. Not  
21 only does the Complaint not cite to or rely on the service agreement, but there is a serious  
22 dispute as to what version(s) of that agreement would apply to Plaintiff and what portion(s) of  
23 that agreement (if any) are enforceable. At best, according to Defendant, the service agreement  
24 was merely "made available" to Plaintiff if he clicked on a hyperlink, and he "agreed" to it only  
25 by checking a box. In these circumstances, none of the cases cited by Defendant support its  
26 argument.

27 The service agreement is not once mentioned, let alone quoted or relied upon, in the  
28 Complaint. The only "agreement" referenced in the Complaint is Defendant's privacy policy,

1 which is a separate document. (Compare Request for Judicial Notice Exhibits 1-5 (service  
 2 agreements) with *Id.* Exhibits 6-8 (privacy policies).) Furthermore, Plaintiff disputes the  
 3 authenticity of the service agreements. Defendant submits five versions of the agreement, each  
 4 of which is approximately 50 pages long, even when printed out single-spaced in 8 point type.  
 5 There is no evidence that the text of any version of the agreement was ever actually displayed to  
 6 Plaintiff, nor that any effort was made to highlight to him the alleged waivers of his rights,  
 7 before he purportedly “agreed” to them.

8 A document may not be judicially noticed unless it is referred to “extensively” or the  
 9 document forms the basis of the plaintiff’s claim. *See United States v. Ritchie*, 342 F.3d 903,  
 10 908 (9th Cir. 2003); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9<sup>th</sup> Cir. 1994); *Venture Assoc.*  
 11 *Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). For example, when a  
 12 plaintiff’s claim about insurance coverage is based on the contents of a coverage plan, the  
 13 coverage plan is admissible, *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9<sup>th</sup> Cir. 1986), or when  
 14 a plaintiff’s claim about stock fraud is based on the contents of SEC filings, those filings are  
 15 admissible. *See In re Silicon Graphics Secs. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999).

16 The cases cited by Defendant, which misapplies this standard, are inapposite. In *Branch*  
 17 *v. Tunnell*, for example, the lower court considered a deposition transcript that was specifically  
 18 referenced in, but not attached to, the complaint. *See id.* at 453-54. Neither party objected to the  
 19 authenticity of the document. On that basis, the Ninth Circuit determined that it was properly  
 20 considered. The court explained that “a document is not ‘outside’ the complaint if the complaint  
 21 ***specifically refers*** to the document ***and*** if its ***authenticity is not questioned.***” *Id.* at 454 *citing*  
 22 *Townsend v. Columbia Operations*, 667 F.2d 844, 848-49 (9th Cir. 1982) (emphasis supplied).  
 23 Likewise, in *Parrino*, 146 F.3d at 706, the court held that a plaintiff could not survive a Rule  
 24 12(b)(6) motion by deliberately omitting references to documents upon which their claims are  
 25 based. *Id.* The Ninth Circuit affirmed, explaining that a district court ruling on a motion to  
 26 dismiss may consider a document the authenticity of which is ***not contested, and*** upon which the  
 27 plaintiff’s complaint ***necessarily relies.*** *Id.* (emphasis supplied.) The court further explained  
 28 this holding by stating that “where...an attached document is integral to the plaintiff’s claims and

1 its authenticity is not disputed, the plaintiff obviously is on notice of the contents of the  
 2 document and the need for a chance to refute evidence is greatly diminished.” *Id.* at 706, n.4  
 3 citing *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196-97 (3d Cir.  
 4 1993); see also *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399, 1411 (9th Cir.  
 5 1996) (admitting full text of a prospectus was filed with SEC whose “contents [were] alleged in a  
 6 complaint and whose authenticity no party question[ed]”).<sup>1</sup>

7 Here, Defendant asks this Court to consider an agreement that (1) is not specifically  
 8 mentioned in the Complaint, (2) the authenticity of which is vigorously contested, and (3) as to  
 9 which Plaintiff is neither on notice of the contents nor given a chance to refute the “evidence”  
 10 that the contract was consummated. Each of the cases cited by Defendant, including *Parrino*,  
 11 strongly supports denying Defendant’s request to consider any of the multitude service  
 12 agreements.

#### 13 B. The Court Cases Contain No Judicially Noticeable “Facts.”

14 Documents that are part of the public record may be judicially noticed to show, for  
 15 example, that a judicial proceeding occurred or that a document was filed in another court case.  
 16 But a court may not take judicial notice of findings of facts from another case, or use such  
 17 findings against Plaintiff, who was not a party to that case. See *Wyatt v. Terhune*, 315 F.3d 1108,  
 18 1114 & n. 5 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001);  
 19 *Jones*, 29 F.3d at 1553. Nor may the court take judicial notice of any matter in dispute. *Lee*, 250  
 20 F.3d at 689-90; *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001).

21 At best these cases may be offered as precedents, not judicially noticeable “facts.” Their  
 22 applicability (or lack thereof) is accordingly addressed in the oppositions to the motions in which  
 23 they were cited. Judicial notice, however, should be denied.

24  
 25  
 26 <sup>1</sup> If this Court elects to take judicial notice of the service agreement, it should convert the  
 27 12(b)(6) motion into a Rule 56 motion for summary judgment, and give Plaintiff an opportunity  
 28 to take discovery and present evidence in response. See Fed. R. Civ. P. 12(b); *Parrino*, 146 F.3d  
 at 706.

1 **III. CONCLUSION**

2 Defendant's request for judicial notice of the service agreements, privacy policies and the  
3 other cases should be denied.

4 Dated: December 14, 2007

Respectfully Submitted,

5 **GUTRIDE SAFIER REESE LLP**

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